



ANDREW M. CUOMO
Governor

Department
of Health

HOWARD A. ZUCKER, M.D., J.D.
Acting Commissioner

SALLY DRESLIN, M.S., R.N.
Executive Deputy Commissioner

Public

February 10, 2015

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Sergy Gabinsky, M.D.
#66604-054
FCI Otisville
P.O. Box 1000
Otisville, New York 10963

David W. Quist, Esq.
NYS Department of Health
ESP-Corning Tower-Room 2512
Albany, New York 12237

RE: In the Matter of Sergy Gabinsky, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 15-030) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective [REDACTED] or seven (7) days after mailing by certified mail as per the provisions of §230, subd. [REDACTED] paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine if said license has been revoked, annulled, suspended or surrendered, together with the registration certificate. Delivery shall be by either certified mail or in person to:

Office of Professional Medical Conduct
New York State Department of Health
Riverview Center
150 Broadway – Suite 355
Albany, New York 12204

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,



James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah

Enclosure

STATE OF NEW YORK DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

Sergey Gabinsky, M.D. (Respondent)

A proceeding to review a Determination by a Committee (Committee) from the Board for Professional Medical Conduct (BPMC)

Administrative Review Board (ARB)

Determination and Order No. 15-030

CCP/Y

Before ARB Members D'Anna, Koenig, Grabiec, [REDACTED] and Milone
Administrative Law Judge James F. Horan drafted [REDACTED] Determination

For the Department of Health (Petitioner): David V. Quist, Esq.
For the Respondent: Pro Se

After a hearing below, a BPMC Committee determined that the Respondent committed professional misconduct by engaging in conduct that resulted in the Respondent's Federal felony conviction. The Committee voted to revoke the Respondent's license to practice medicine in New York State (License). In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2015), the Respondent asks the ARB to overturn the Committee's Determination or remand for further proceedings. After considering the Committee's Determination, the hearing record and the parties' review submissions, the ARB remands this case to the Committee, pursuant to PHL § 230-c(4)(b), for the Committee to conduct additional proceedings.

Committee Determination on the Charges

Pursuant to PHL § 230 *et seq.*, BPMC and its Committees function as a duly authorized professional disciplinary agency of the State of New York. The BPMC Committee in this case conducted a hearing under the expedited hearing procedures (Direct Referral Hearing) in PHL

§230(10)(p). The Petitioner's Statement of Charges [Hearing Exhibit 1] alleged that the Respondent committed professional misconduct under the definition in New York Education Law (EL) §6530(9)(a)(ii) (McKinney 2015) by engaging in conduct that resulted in a conviction under Federal Law. The action against the Respondent began with an order from the Commissioner of Health suspending the Respondent's License summarily (Summary Order) pursuant to PHL § 230(12)(b). The Summary Suspension became effective February 12, 2014. In the Direct Referral Hearing, the statute limits the Committee to determining the nature and severity for the penalty to impose against the licensee, In the Matter of Wolkoff v. Chassin, 89 N.Y.2d 250 (1996). Following the Direct Referral Hearing, the Committee rendered the Determination now on review.

The evidence before the Committee indicated that the Respondent entered a guilty plea in United States District Court for the Southern District of New York, to Conspiracy to Commit Health Care Fraud, a Federal felony, in violation of Title 18 USC § 371. The Respondent entered the plea on February 5, 2014, and on the same date, the Respondent entered into a Consent Order of Forfeiture/Money Judgment for \$2,000,000.00, representing the amount of the gross proceeds the Respondent obtained from the criminal activity for which the Respondent entered the guilty plea. The District Court sentenced the Respondent to twenty-four months imprisonment, three years supervised release and \$2,000,000.00 in restitution. The Court also required the Respondent to pay a \$100.00 assessment and recommended that the Respondent participate in a residential alcohol treatment program while incarcerated.

The Committee determined that the Respondent committed professional misconduct under EL § 6530(9)(a)(ii) by engaging in conduct that resulted in the Federal felony conviction. The Committee found that the Respondent's conviction resulted from the Respondent establishing a corporation in Brooklyn to bill no-fault insurance companies fraudulently. The Committee concluded that the Respondent received pecuniary benefits for medical care the Respondent never provided to patients and that the Respondent abused the trust that the public places in a physician. The Committee indicated that they found nothing in the record that demonstrated the Respondent's remorse and nothing that indicated that the Respondent's future

behavior would change for the better. The Committee concluded that License revocation provided the only penalty that would protect the public.

Review History and Issues

The Committee rendered their Determination on May 19, 2014. This proceeding commenced on June 2, 2014, when the Respondent submitted a Notice requesting a Review. The Respondent also requested extensions in the time to file a review brief, until his release from imprisonment and then to obtain legal counsel. The ARB granted the Respondent the extensions into December 2014. The record for review contained the Committee's Determination, the hearing record, the Respondent's brief and the Petitioner's reply brief. The record closed when the ARB received the reply brief on December 15, 2014.

The Respondent took no issue with the Committee's conclusion that the Respondent's conviction provided the basis for finding professional misconduct. The Respondent requested, however, that the ARB either consider mitigating circumstances or remand to the Committee for reconsideration. The Respondent alleged no error by the Committee in assessing the record before the Committee, but rather the Respondent argued that the record before the Committee was incomplete. The Respondent explained that he was unable to appear due to his incarceration and unable to afford a lawyer to appear for the Respondent. The Respondent argued that if the Committee had the minutes from the plea and sentencing, the Committee could have seen that the Respondent showed genuine remorse, took full responsibility for his past behavior and made representations that he would never repeat such behavior. The Respondent also indicated that he would accept whatever less severe penalty available, such as suspension, practice restrictions and/or re-education.

The Petitioner replied that the Respondent was offering the ARB information from outside the hearing record. The Petitioner argued that the Respondent received notice about the hearing and had ample opportunity to obtain counsel, appear by telephone or provide a written statement and other information to the Committee. The Petitioner noted that the Respondent's criminal conduct related directly to his medical practice. The Petitioner described the Committee's Determination as correct and the Petitioner requested that the ARB uphold the revocation.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL § 230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minnelly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of

society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. We vote 4-1 to remand this case to the Committee so the Respondent can have the opportunity to appear before and present mitigating evidence to the Committee. The majority finds the record unclear as to what opportunities the Respondent had for presenting evidence from prison for the original hearing. The Respondent indicated that he was unaware of his options and lacked resources such as internet or telephone access.

The penalty the Committee imposed will remain in effect during the remand period. If the Committee has any questions about this remand, the Committee should direct those questions to the ARB in writing, in a letter from the Committee's Administrative Officer to the Administrative Officer for the ARB, with copies to the parties. Following the remand hearing,

the Committee should render a Supplemental Determination and serve the Determination on the parties. The ARB will offer the parties the chance to comment upon or challenge the Committee's Supplemental Determination, prior to the time that the ARB considers the ~~Supplemental~~ Determination.

ORDER

NOW, with this Determination as ~~basis~~ basis, the ARB renders the following ORDER:

1. The ARB remands the case to the Committee for further consideration.
2. The Committee shall conduct a further hearing and render a Supplemental Determination.

Peter S. Koenig, Sr.
Steven Grabiec, M.D.
Linda Prescott Wilson
John A. D'Anna, M.D.
Richard D. Milone, M.D.

To:

Sergey Gabinsky, M.D.

David W. Quist, Esq.
NYS Dept. of Health
Rm. 2512 Coming Tower – ESP
Albany, NY 12237

In the Matter of Sergey Gabinsky, M.D.

Linda Prescott Wilson, an ARB Member, affirms that she took part in the deliberations in this case and that the attached Determination reflects the decision by the ARB majority in the Matter of Dr. Gabinsky.

Dated: 28 January, 2015

Linda Prescott Wilson

In the Matter of Sergey Gabinsky, M.D.

Peter S. Koenig, Sr., an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflects the decision by the ARB majority in the Matter of Dr. Gabinsky.

Dated: January 28, 2015

A large rectangular black redaction box covers the signature of Peter S. Koenig, Sr.

Peter S. Koenig, Sr.

In the Matter of Sergey Gabinsky, M.D.

Steven Grabiec, M.D., an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflects the decision by the ARB majority in the Matter of Dr. Gabinsky.

Dated: 1 / 29 / 2015


Steven Grabiec, M.D.

In the Matter of Sergey Gabinsky, M.D.

Richard D. Milone, an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflect the decision by the ARB majority in the Matter of Dr.

Gabinsky.

Dated March 3, 2015



Richard D. Milone, M.D.

In the Matter of Sergey Gabinsky, M.D.

John A. D'Anna, M.D., an ARB Member, affirms that he took part in the deliberations in this case and that this Determination reflects the decision by the ARB majority in the Matter of Dr. Gabinsky.

Dated: 1-4-15, 2015



John A. D'Anna, M.D.